HWG | HARRIS, WILTSHIRE & GRANNIS LLP

June 15, 2018

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Communication in MB Docket No. 17-318

Dear Ms. Dortch:

On June 13, 2018, Ross Lieberman of the American Cable Association and Michael Nilsson of Harris, Wiltshire & Grannis LLP met with Michelle Carey and Brendan Holland of the Media Bureau to discuss the national ownership cap proceeding. We discussed ACA's comments and reply comments filed in this proceeding,[1] as described in more detail below.

Essentially all broadcaster proposals in this proceeding fall into one of two categories: proposals to eliminate or increase the national cap itself[2] or proposals to broaden and expand the UHF Discount.[3] We discuss each in turn.

1. Proposals to Increase the National Cap.

In our initial comments, we observed that the Commission has committed to engage in a cost-benefit analysis with respect to the national cap.[4] We suggested that the best evidence in

---

1 Comments of the American Cable Association, MB Docket No. 17-318 (filed Mar. 19, 2018) ("ACA Comments"); Reply Comments of the American Cable Association, MB Docket No. 17-318 (filed Apr. 18, 2018) ("ACA Reply Comments").

2 *E.g.*, Letter from Hearst Television, Inc. *et al.* to Marlene Dortch, MB Docket No. 17-318 (filed May 16, 2018).

3 *See* Comments of the National Association of Broadcasters, MB Docket No. 17-318 at 25 (filed Mar. 19, 2018) ("NAB Comments"); Letter from Mace Rosenstein to Marlene Dortch, MB Docket No. 17-318 (filed May 30, 2018).

4 *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 32 FCC Rcd. 10785 ¶ 23 (2017) ("*Notice*"); *see also id.* ("We ask commenters supporting modification or elimination of the current 39 percent audience reach cap or the UHF discount to explain the anticipated

this proceeding and elsewhere shows that increasing the national cap will lead to higher retransmission consent prices, much of which will be passed along to consumers.[5] We thus urged the Commission to (1) confirm and quantify this harm through its own econometric analysis; and (2) weigh it against any asserted benefits of raising the cap. Failure to do so would violate the Administrative Procedure Act's prohibition on arbitrary and capricious decision making, including the requirement that it consider all issues raised in the record.[6] We believe that no party disputes this basic premise. Certainly, no party has stated specifically that the Commission can lawfully ignore issues raised in the record.

Procedural Matters. Broadcasters *do* say that such price increases are not "*per se* harmful."[7] Here again, however, we think broadcasters essentially agree with the basic manner in which the Commission should examine this issue. We do not take broadcasters to dispute the premise that, if raising the cap increases retail prices, this would cause consumer harm holding all other factors constant. How could they?[8] We take them instead to argue that higher retail

---

economic impact of any proposed action and, where possible, to quantify benefits and costs of proposed actions and alternatives. Does the current national audience reach cap create benefits or costs for any segment of consumers? Does the cap create benefits or costs for any segment of the industry that should be counted as social benefits or costs rather than transfers from one segment of the industry to another? How does the cap create these benefits and costs, and what evidence supports this explanation? How can the value of these benefits and costs be measured for parties receiving them?").

5 ACA Comments at 6-10.

6 *E.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L. Ed. 2d 443 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

7 *E.g.*, Reply Comments of Sinclair Broadcast Group, MB Docket No. 17-318 at 7 (filed Apr. 18, 2018).

8 Broadcasters *have* come close to making such claims before, however. In its proposed merger with Tribune, for example, Sinclair has claimed that retransmission consent issues "are not relevant to the public interest determination the Commission must make." Congress, it argued, has already created a "marketplace" for retransmission consent. When fees "are determined by the give and take of the marketplace, the public interest is served." So even if that transaction would permit Sinclair to increase retransmission consent fees significantly, "those higher rates reflect the marketplace at work." Put another way, according to Applicants, "[t]he free market rate is the rate that best serves the public interest." Applicants' Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179 at 27-40 (filed Aug. 22, 2017).

fees would *create other benefits that outweigh those harms*. So our main point here remains a procedural one—if the Commission concludes that retransmission consent prices would rise as a result of raising or eliminating the cap (which all available evidence suggests would happen), it should explicitly acknowledge that such price increases necessarily have a direct harm to consumers. It can then decide if the claimed benefits—countervailing or otherwise—outweigh these harms. Again, failure to do so would be unlawful.

Claims of Offsetting Benefits. As for broadcasters' specific claims of offsetting benefits to higher retransmission consent prices, we are highly skeptical. One such claim is that broadcasters use higher fees to provide news and other publicly beneficial services.[9] We do not think any fair reading of the evidence suggests that broadcasters have improved their news offerings in recent years as retransmission consent prices have risen. Certainly, the record in this proceeding contains no such evidence—nor, in truth, any evidence at all to support this claim.

Another claim is that broadcast prices are "too low" now, either because broadcasters have to negotiate against MVPDs not subject to ownership limits or because they compete against cable programmers not subject to such limits.[10] Therefore, a version of this argument goes, eliminating "artificial" regulatory constraints will help set prices at something more closely approximating their fair market value. Broadcasters have failed to support this notion with evidence in the record. And whatever the merits of such an approach generally,[11] this claim seems especially difficult to maintain here, where the very idea of a "fair market value" must contend with dozens of regulations interfering with the "marketplace." Broadcasters' leverage exists in large part because of legacy government regulations granting them monopoly control over scarce spectrum resources. Even today, the retransmission consent "marketplace,"

---

[9] Sinclair Reply Comments at 7.

[10] Reply Comments of the National Association of Broadcasters, MB Docket No. 17-318 at 29-30 (filed Apr. 18, 2018).

[11] It would, of course, be noteworthy for the Commission to take regulatory action because it decided that prices charged by a particular corporate interest are "too low" and that consumers therefore ought to pay more. It would be especially so where, as here, retransmission consent prices have increased geometrically over the last decade and show no sign of stopping. "Retransmission Fees: A Dominant Topic At S&P Summit." Radio + Television Business Report (June 14, 2018), available at https://www.rbr.com/spglobal-tv-radio-finance-summit-2018/ ("'You pay your bills with dollars, not margins, and that's why we focus on retrans growing every year,' observed Chris Ripley, CEO of Sinclair Broadcast Group, during a panel of TV executives on the future of the business. 'As long as we can add dollars to the bottom line, we don't care where the margin is.'"). In light of nearly a century in which Commission regulation existed principally to protect the public interest, any such decision would require an especially persuasive explanation in order to pass APA muster. *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

moreover, remains governed by a suite of regulations that protect broadcasters so that they may fulfill their claimed status as unique stewards of the public trust. Both Chairman Pai and Commissioner O'Rielly have acknowledged that these regulations distort carriage negotiations.[12] Others have recently done the same.[13] Eliminating or raising the national cap, then, would not create a "pure marketplace" akin to that for cable programming in which the "true value" of broadcast content can be found. Rather, it would modify one regulation in an otherwise highly regulated marketplace—potentially increasing the distortions created by the remaining regulations. To reach any conclusion about such matters would require a far more complex analysis than that provided by the broadcasters in this proceeding.

Arguments about removing "artificial" constraints on broadcasters also ignore the ground rules that Congress established in 1992 to govern this particular marketplace. When Congress gave broadcasters a unique, quasi-copyright "retransmission consent" right, the national cap was even stricter than today, limiting broadcasters to 25 percent national audience reach.[14] Congress created retransmission consent, moreover, based on the explicit and exhaustively debated understanding that retransmission consent would be exercised on a local, not a national basis.[15] Indeed, in order to obtain support, the National Association of Broadcasters had to assure Congress that national networks (then the only national actors in the broadcast space) would

---

[12] *Amendment of the Commission's Rules Related to Retransmission Consent*, Statement of Commissioner Pai, 29 FCC Rcd. 3351, 3429 (2014) ("The anti-competitive potential of joint negotiations here is only amplified by the regulatory context for video carriage, including the compulsory copyright license, network non-duplication rule, and syndicated exclusivity rule."); *Id.* at 3431, Statement of Commissioner O'Rielly ("I am sympathetic to the argument that it may not be necessary for the Commission to continue enforcing network non-duplication and syndication exclusivity rules when these can be addressed through private contracts.").

[13] *See* Letter from the Center for Individual Freedom to the Federal Communications Commission, MB Docket Nos. 10-71, 15-216 (filed May 31, 2018).

[14] *Notice*, 32 FCC Rcd. at ¶¶ 3-4.

[15] For example, discussing retransmission consent on the floor of the Senate, Senator Inouye, the provision's author, distinguished between the national broadcast networks and network affiliated stations, stating that retransmission consent will "permit local stations, not national networks . . . to control the use of their signals." 138 Cong. Rec. S562-63 (Jan. 29, 1992) Other members of Congress echoed Senator Inouye's statement. *See, e.g.*, 138 Cong. Rec. H6491 (July 23, 1992) (Statement of Rep. Callahan) ("The right to retransmission consent . . . is a local right. This is not, as some allege, a network bailout for Dan Rather or Jay Leno. Networks are not a party to these negotiations, except in those few instances where they own local stations themselves."); 138 Cong. Rec. H6493 (statement of Rep. Chandler) ("The intent of the [retransmission consent] amendment was to give bargaining power to local broadcasters when negotiating the terms of cable carriage - not to serve as a subsidy for major networks.").

have "no role" in retransmission consent negotiations.[16] Raising or eliminating the national cap would take retransmission consent negotiations even further away from the "marketplace" envisioned by Congress, in which local broadcasters would negotiate with MVPDs for local carriage.

2. Proposals to Broaden the UHF Discount.

NAB argues that, because broadcast ratings have decreased in recent years, stations now "reach" a smaller audience than they did before—so all stations (UHF and VHF alike) should now receive a UHF discount.[17] As we stated in our Reply Comments, the only reason to do this is if one thinks that the FCC lacks authority to change the cap itself, but possesses authority to modify the UHF Discount. Yet even in such circumstances, the Commission cannot lawfully adopt NAB's proposal.

First, if the Commission has any legal authority to disturb the UHF discount, it still may not transmogrify the existing signal-propagation based discount into one based on ratings. The Third Circuit indicated that when Congress adopted the "administratively defined" term "national audience reach," it incorporated the Commission's then-existing definition of that term into law.[18] The Commission has always defined "reach" in terms of whether a viewer can physically access broadcast signals. So (for example) the introduction of a new technical format with entirely different signal propagation characteristics might, as an engineering matter, justify adjusting or even eliminating the UHF discount to account for the change. Ratings, by contrast, measure something very different—whether people who can physically access a particular station choose to do so. Ratings have nothing to do with a station's "reach," at least as the Commission has always understood that term.[19] And the Commission cannot now change that understanding—which, since at least 2004, has been Congress's understanding too.

---

[16] *E.g.*, NAB, "How to Respond to Cable's Attacks on Retransmission Consent," *attached to* Joint Comments of Mediacom Communications Corp. *et al.*, MB Docket No. 10-71 (May 27, 2011) ("Retransmission consent is a right granted to stations in their local areas. Networks are not involved in any negotiations.").

[17] NAB Comments at 25-35.

[18] *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 396 (3d Cir. 2004) ("*Prometheus I*") (internal citations omitted).

[19] *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (where "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"); *United States v. Ramirez-Ferrer*, 82 F.3d 1131, 1137 (1st Cir. 1996) ("Courts must presume that Congress knows of prior judicial or executive branch interpretations of a statute when it reenacts or amends a statute."); *Casey v. Commissioner of Internal Revenue*, 830 F.2d 1092, 1095 (10th Cir. 1987) ("When Congress is, or should be, aware of an interpretation of a statute by the agency charged with its administration, Congress'

Even if the Commission could lawfully modify how the UHF discount approaches "audience reach" from one based on physical availability to one based on ratings, it would be arbitrary and capricious to create a ratings-based rule giving all stations the *same* discount. Indeed, the NAB proposal has it entirely backwards: because existing law already gives UHF stations a discount, the proposal would give a new discount only to the VHF stations that, historically, have enjoyed the *highest* ratings.

* * *

In accordance with the Commission's rules, I will file one copy of this letter electronically in MB Docket No. 17-318.

Respectfully submitted,

Michael Nilsson
Counsel to the American Cable Association

cc: Meeting Participants

amendment or reenactment of the statutory scheme without overruling or clarifying the agency's interpretation is considered as approval of the agency interpretation.").